IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2455 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

LEGAL HEIRS OF DECEASED DAUD YAKUBBHAI

Versus

MANAGER

Appearance:

1. Special Civil Application No. 2455 of 2002

MR KISHOR M PAUL for Petitioner No. 1-1/7

MR KARTIK THAKER for M/S TRIVEDI & GUPTA for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 15/07/2002

ORAL JUDGEMENT

1. The present petition has bene filed by the legal heirs of deceased Daud Yakubbhai, who was working as a Watchman with the respondent from 1951. The

deceased workman had put in about 25 years of service with the respondent company. According to the petitioners, the deceased had fallen sick on 30th November, 1973 and he was admitted in the hospital as an indoor patient for treatment and he remained in the hospital till 30th June, 1974. It is the say of the petitioners that despite having applied for extension of leave, the same was not granted and he was served with a charge-sheet for remaining absent unauthorizedly and subsequently he was removed from the service with effect from 4th June, 1974 vide order dated 30th June, 1974.

1.1. The said order of removal from service was challenged by way of reference which came to be filed before the Labour Court, Rajkot as Reference [LCR] No. 137/1974. The said Reference was partly allowed. The Labour Court while upholding the termination of the service of the deceased workman, directed respondent to pay legal dues like retrenchment compensation, gratuity, etc. The deceased workman therefore, approached this Court by way of filing Special Civil Application No. 3668 of 1981. In that petition this Court directed the respondent to reinstate the deceased workman and to pay him back wages except for the period of 4 years from 1/1/1978 to 31/12/1981.

1.2. As per the order of this Court the respondent calculated the back wages of the deceased workman upto 7th December, 1983 which came to Rs.49,659-94, out of which Rs.4,570/- was deducted under the head of income tax. It was during the hearing of Special Civil Appln. No. 3668 of 1981 that some controversy with regard to the birth date of the petitioner arose and this Court, therefore, while issuing direction with regard to reinstatement in service with full back wages, observed that the back wages should be paid till the date of reinstatement or till the date of superannuation, whichever is earlier. It is the say of the petitioners that vide notice dated 15th February, 1984 it was pointed out to the respondent that birth date of the deceased was 9th August, 1929. Alongwith the said notice a copy of the birth certificate was also annexed. It may be noted here that the controversy is whether birth date of the deceased workman is 1923 or it is 9/8/1929. It also appears from the record of the petition that at the time when the deceased workman joined the service of the respondent entry with regard to his birth date was made in the service book maintained by the respondent and in that book the year of the birth

came to be noted as 1923. Again the deceased workman gave a legal notice to the respondent through his lawyer dated 30th January, 1985 and a copy of the birth certificate was enclosed with the said notice. According to the petitioners, both the aforesaid notices were never replied to by the respondent.

1.3. Ultimately the deceased workman was required to file a reference with regard to determination of his birth date and the said reference came to be numbered as Reference [LCR] No. 2022/1986. The said proceedings subsequently came to be transferred to the Labour Court at Jamnagar and the Reference was renumbered as Reference [LCJ] No. 532 of 1990. The said reference came to be contested by respondent by filing written statement at Exh. 8 wherein all the contentions that had been raised by the deceased workman in the statement of claim were denied and not admitted.

1.4. Before the Labour Court the deceased workman examined himself as well as one Mr. Jumabhai Bahadur Sandhar, principal of Lakhasar Primary School at Hapa. During the course of hearing the deceased workman had also produced certain documentary evidence which included the birth certificate and extract from the statement of school leaving chart.

1.5. As against that, the respondent had examined one Utpal Dinkarrai Dave, who had produced certain relevant record in the form of provident fund scheme, form of getting service and employment card. At the end of the trial, the Labour Court came to the conclusion that the deceased workman was not able to prove his case and further that he had never disputed his date of birth which was recorded by the respondent. The Labour Court was also of the opinion that at a belated stage i.e. at the stage of reaching the age of superannuation, the workman cannot agitate any issue with regard to correction of his birth date in the service book on the ground that the wrong date of birth has been mentioned in that record. After dismissal of the Reference by the Labour Court, the deceased workman expired on 9th August, 2001. His legal heirs have therefore, approached this Court to challenge the dismissal of the Reference by the Labour Court, Jamnagar.

2. Mr. K.M. Paul, learned counsel for the

petitioner has submitted before me that in the service record the birth year of deceased workman is shown to be 1923, which is not correct. He further submitted that the correct birth date of the deceased workman was 9th August, 1929 and for that reason he would have continued in the service for longer period and the respondent was not justified in paying him the back wages only for the period stated above. According to Mr. Paul, respondent did not have any data with it to enable it to mention the date in the service book of the deceased workman and hence his age was determined by medical examination, which is known as ossification test. He, therefore, submitted that in view of the margin of error which may occur in such cases, an accurate date can not be fixed with regard to the birth of a particular person. He, therefore, submitted that the birth date of the deceased workman shown in the service book was not accurate. He further submitted that when the case of the deceased workman is supported by authenticated documents like school leaving certificate and the chart of the school in which the deceased workman was studying, there was no reason for the Labour Court not to believe these documents and not to accept the case of the deceased workman. In support of his submission Mr. Paul also drew my attention to various documentary evidence which has been brought on record of this petition by way of annexures.

2.1. As against that, Mr. Kartik Thaker, learned counsel for the respondent submitted that the petitioners have approached this Court at the belated stage and no plausible explanation has been rendered for filing the petition after a lapse of 3 years from the date of award and for that ground alone this petition deserves to be dismissed. He further submitted that even the deceased workman who had challenged the earlier award before tis Court claiming reinstatement in the service, had approached at a belated stage. Therefore, when the remedies available to him are not resorted to in time, that itself becomes a ground for not entertaining this petition. He further submitted that note regarding the birth date of the deceased workman was made in his service record at his instance and also to get it confirmed he was medically examined. The deceased workman therefore, had no reason to challenge the same at the fag end of his service. Mr. Thaker also submitted that the reliance has been placed on the school leaving certificate before the Labour Court by the deceased workman in support of his say that his birth date was not correctly mentioned in the service record; whereas in the

two notices which the deceased workman has given to the respondent through his advocates enclosing his birth certificate, no such birth certificate has been produced by the deceased workman on record. Thus, there is variance between the two versions. He further submitted that the deceased workman is not correct when he states that at the time of joining the service he had given the birth certificate as mentioned in the notice. However, if the proceedings of the Labour Court are perused, no such case has been pleaded by him. On the contrary, according to Mr. Thaker, in the statement of claim the deceased workman has said that when he joined the service he had not produced the birth certificate and, therefore, the respondent had obtained a certificate from the Medical officer determining his year of birth as 1923. Mr. Thaker also drew my attention to the documents produced by the respondent, namely the provident fund nomination form and the identity card wherein the birth date of the deceased workman has been shown as 1923 and those documents have been duly signed by him. He, therefore, knew even at that stage that in the service record his birth date was mentioned as 1923. Despite that, at no point of time he had raised any objection to such date having been mentioned in the service record. Mr, Thaker, therefore, submitted that at the time when he was superannuated he could not have raised dispute with regard to the correctness of his birth date mentioned in the service record. He also drew my attention to the evidence of the Principal of the school examined on behalf of the deceased workman before the Labour Court and the school leaving certificate produced by the deceased workman. According to Mr. Thaker, the evidence of the Principal of the school does not support the birth certificate and certain inherent infirmities are to be found, which go to the root of this controversy. According to Mr. Thaker, since there is variance between the two, the birth certificate produced by the deceased workman and relied on by the petitioners in this petition cannot be taken at its face value.

2.2. He has also drawn my attention to various discrepancies which are to be found in the evidence of the deceased workman, the Principal of the school and the school leaving certificate and other documentary evidence produced by the deceased workman in support of his case to show that none of this is reliable and it cannot be termed as cogent evidence so as to establish the case of the deceased workman. He has further submitted that there were several proceedings which have taken place earlier than the present proceedings and in none of these

proceedings the deceased had challenged his birth date as shown in the service record nor he had produced either the birth certificate or the school leaving certificate. In that view of the matter, he cannot be allowed to raise such dispute after a lapse of 40 years from the date on which his birth date was recorded in the service book.

2.3. In reply to the submissions made by Mr. Thaker, Mr. Paul has contended that the certificate produced by the deceased workman is genuine and it is also found to be true by the Labour Court. Therefore, the same has to be accepted and the matter has to be decided in light thereof. He has also placed reliance on certain authorities which will be mentioned in the course of this judgment. Mr. Paul also made submission to explain the delay that had been caused for approaching this Court. He ultimately submitted that this petition deserves to be allowed.

3. I have carefully scrutinised the record of this petition and I have also considered the rival contentions in light of the evidence that has been adduced by both the sides. Considering the dispute which is involved in present proceedings, it would not be necessary for me to go in detail of the earlier reference and the recovery application, except for the purpose to appreciate the contention of Mr. Thaker to the effect that in those proceedings such dispute was never raised by the deceased workman. From the record it appears that the deceased workman had joined the service of the respondent on 7th December, 1948, though in the petition it has been wrongly mentioned as 1951. This fact is not disputed by the otherside. Even document which has been produced by the respondent at Exh. 32 before the Labour Court shows the date of joining as 7th December, 1948. Even the deceased workman in his evidence before the Labour Court has stated that he was working as a Watchman with the respondent since 7th December, 1948. It is, therefore, very clear that the deceased workman joined the service of the respondent on 7th December, 1948. The grievance of the deceased workman is that due to the incorrect birth date noted by the respondent in his service record he has been retired from service with effect from 7th December, 1983 as on that date he had not completed the age of superannuation i.e. 60 years. According to him, his correct birth date is 9th August, 1929. In the evidence before the Labour Court he has stated that at no point of time the respondent had asked him to produce his birth certificate. He has also denied

that since he had not produced his birth certificate before the respondent, his age was got determined by medical examination and on the basis of such date he was relieved from the service as having retired on reaching the age of superannuation. In the cross-examination he has stated that on the day on which he joined the service i.e. 7th December, 1948, he had not produced the birth certificate. He was also asked in the cross-examination that he was given the identity card and in that card his birth date was written. However, in response thereto he has stated that he had no idea whether he possessed the identity card with him. He has also stated that he was not aware whether his birth date was written in the identity card. Further he has stated in the cross-examination that when the respondent removed him from the service, at that time he was not sent to the Medical Officer to get his age ascertained. He has further stated that the respondent used to get him medically checked up every three years but for what purpose he did not know. He also pleaded his ignorance whether in the P.F. nomination form his birth date was written as 8th December, 1923.

3.1. Considering the evidence of the deceased workman, it clearly appears that except his own statement that his correct date of birth was 9th August, 1929 and not 1923 as shown in his service record, there is no material to come to this conclusion. Considering the cross-examination, it also appears that he has deliberately tried to avoid the inconvenient situation in which he was likely to be placed on account of the specific mention about the date of his birth in the P.F. nomination form and the identity card, by stating that he had no idea about this. If the P.F. nomination form is perused, it shows that it has been duly signed by the deceased workman. In that form his date of birth is mentioned as 8th December, 1923. Apart from this, there is employment card for security personnel, wherein his date of birth is shown as 7th December, 1923. This document is, however, not signed by him, but the same appears to be old document and it does not seem to be a fabricated one. However, since the same is not signed, it cannot be said that the deceased workman had knowledge about the date of birth mentioned in this document. For the purpose of deciding this question, this document cannot be of much helpful to this Court.

3.2. The most relevant evidence for the purpose of deciding this controversy is that of Jumabhai

Sandhar, who has been examined by the deceased workman before the Labour Court. According to this witness, he was working as Principal of Lakhasar Primary School at Hapa 3 years' prior to the date of recording of his evidence. He has stated that in that school the students are studying from 1st standard to 4th standard and at the time of their admission, entry with regard to their age is being made in the register. In the course of his evidence he has produced register No.19. In that register at serial no. 19 the name of the deceased workman appears. His birth date is shown as 9th August, 1929. This witness has further stated the deceased workman had joined the school on 12th September, 1934 and had left the school on 5th May 1935. The reason for leaving the school has been stated as "for going out station". This witness has further stated that after verifying the register he had issued the school leaving certificate which he produced on record as Exh. 25. He also produced xerox copy of the extract of the aforesaid register which came to be marked as Exh. 26. He has stated in the examination-in-chief that the birth certificate was signed by him. In the cross-examination this witness has stated that the entry in the register is made on the day on which the student gets admission in the school. He was shown the hand writing that appeared on pages 3 and 4 of the said register and was asked as to whose hand writings they were. The witness was, however, not able to identify the hand writings. He nonetheless admitted that from serial nos. 21 to 36 the hand writings appeared to be same and they appeared to have been written at the same time with the same ink. He has further stated that he was unable to state whether this very register was copied form some other register. He, however, denied that this register had been prepared afterwards. He also admitted that the fact regarding admission of the deceased workman in the school was stated by him on the basis of this register.

3.3. Evidence of this witness can well be appreciated in the light of the birth certificate that has been produced at Exh. 25 and also relevant extract of the register maintained by the school. The school leaving certificate which is at Exh. 25 gives the date of birth as 9th August, 1929. It mentions the date of admission in the school as 3rd June, 1935 and it states the date of leaving the school as 5th May, 1939. These facts have been mentioned at serial nos. 4, 6 and 9 of the said certificate. The information contained in this certificate, therefore, does not tally with the evidence of Jumabhai Bahadurbhai as according to this witness, the

deceased workman had joined the school on 12th September, 1934 and had left the school on 5th May, 1935. There is great variance between the dates of admission and the leaving of the school mentioned in the certificate and the dates that have been mentioned by this witness. Again in the evidence Jumabhai has stated that certificate at Exh. 25 has been issued by him on the basis of the register maintained by the school and the same has been signed by him. If Exh. 25 is read carefully, it shows that it has been signed by one C.M. Thaker and not by the witness. Moreover, if the certificate is compared with the extract of the register that has been produced by Jumabhai at Exh. 26, on page 3 in the last column under the head of "date of admission in the school" the date has been mentioned as 12th September, 1934 and on page 4 in the 4th column under the head of "date of leaving the school" is mentioned as 5th May, 1935. As per the say of witness Jumabhai, he had issued school leaving certificate Exh. 25 after verifying the record of the school in the form of the aforesaid register. If that be so, then the dates mentioned in the certificate with regard to admission and leaving the school and dates mentioned in the register would have tallied. These dates as can be seen do not tally. The veracity of these documents, therefore, becomes very much doubtful. Since the entire case is based on the strength of this school leaving certificate, it was the bounden duty of the deceased workman to produce such document which would inspire confidence of the Court so as to enable the Court to come to a definite conclusion without any hesitation. If the evidence of Jumabhai is appreciated in the light of this certificate at Exh. 25 and the extract of the register at Exh. 26, same does not inspire any confidence. For the same reasons, the school leaving certificate produced a Exh. 25 and extensively relied on by the deceased workman and the petitioners also does not inspire confidence. Need less to say that the extract of the register produced by Jumabhai cannot be said to be reliable. In that view of the matter, the Court does not find any other material which can substantiate the case of the petitioners that the correct birth date of the deceased workman was 9th August, 1929. It is well known principle of law that when some facts have been asserted by a person, it is his duty to substantiate the same with cogent and reliable evidence. In the instant case that is found lacking.

3.4. Apart from that, if document at Exh. 32, which is works monthly employees' register, shows the age of the deceased workman on the date of joining the

service as 25 years. As already stated above, he joined the service on 7th December, 1948. If 1923 is taken as the year of the birth of the deceased respondent, on the date of joining of his service, he would be of 25 years. However, if the date of his birth is taken as 9th August, 1929, on the date of joining his service he would be only of 19 years. This document is duly signed by the deceased workman. This document, therefore, confirms the case of the respondent that the year of the birth of the deceased workman was 1923. The respondent has also placed reliance on the document Exh. 23 which is declaration and nomination form under the Employees Provident Fund Scheme. In that form also the year of the birth of the deceased workman is shown as 1923. This document is also duly signed by the deceased workman. Both these documents, if perused carefully, they show that they are quite old and there is no reason to doubt them. It may be pertinent to note here that according to Mr. Paul the deceased workman was not knowing English language as can be seen from Exh. 32 and the languages spoken by him were Urdu, Gujarati and Hindi. However, it is difficult to tell that when the deceased workman was signing these documents, he would not have tried to know from the respondent as to what these documents contained. At that time there was no reason for the respondent to conceal from him the birth date written in these documents. It can therefore, be safely presumed that the deceased workman was aware about his birth date that was written in his service record. Despite that, he had raised this dispute only at the time when he was retired by the respondent upon attaining age of 60 years in the year 1983. For almost 40 years the deceased workman sat quiet over this issue, despite the fact that in between several opportunities were available to him to agitate this question with the respondent. He has chosen not to do so and for that purpose no one else is to be blamed.

3.5. Mr. Paul has placed reliance on the decision rendered by the Apex Court in the case of Cement Corporation of India Ltd. v/s. Raghbir Singh reported in 2002 AIR SCW p. 56. In that case the Apex Court did no find it objectionable even when the dispute with regard to correction of birth date was raised two years after the date of retirement. However, in that case the Apex Court found that the date of birth of respondent of that case being 2nd February, 1936 could not be seriously disputed in view of the certificate issued by the Registrar of Births and Deaths. In the instant case, the certificate that has been sought to be relied on by the petitioners itself is doubtful. For the reasons that

have been already stated above, this certificate does not inspire confidence of this Court at all. In that view of the matter, this decision of the Apex Court cannot be of any help to Mr. Paul. Since the entire issue can simply be decided on the facts of this case, there is no need for me to consider the other decisions cited by the learned counsels for both the sides. When the entire basis of the petitioners' claim is not found to be believable, the petitioners cannot succeed in this petition.

4. Normally sitting under Article 227 of the Constitution of India, I would not have entered into the facts of the case and reappreciated the evidence on record. However, the decision of the Labour Court has been simply rendered on the fact that the deceased workman has agitated the question with regard to correctness of his birth date at the fag end of his service, the same cannot be entertained. However, even by reappreciating the fact, I am not inclined to grant this petition. Since the petition does not have any merit, it deserves to be dismissed. The petition is, therefore, dismissed. Rule discharged with no order as to costs.

[Akshay H. Mehta, J.]

* Pansala.